U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 September 2005

BALCA Case No. **2004-INA-281**
ETA Case No. P2002-CA-09534026/JS

In the Matter of:

MARLINDA WEST NURSING HOME,
Employer,

on behalf of

MARIBEL CARBALLO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Maria Marrero, Esquire
Huntington Park, California
For the Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Maribel Caraballo ("the Alien") filed by Marlinda West Nursing Home ("the Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §

1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations.[1] The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer subsequently requested review before the Board of Alien Labor Certification Appeals ("the Board") pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 23, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Nursing Aide. (AF 23-24).

On December 8, 2003, the CO issued a Notice of Findings ("NOF") indicating his intent to deny the application. The CO noted that the Employer did not appear to exist at the address provided. In order to correct this deficiency the Employer was required to supply its business license and confirm the name of the business. Additionally, the Employer was required to supply a W-2 for the Alien, plus indicate the number of employees hired by the Employer and their positions. The CO also found that it did not appear that the Employer recruited U.S. workers in good faith. The CO noted that the applicants in many instances received a letter inviting them to come for an interview the day before the interview. Additionally the certified return receipt was addressed to the Employer's agent "Estamos Unidos Immigration Service," which the CO noted, could have discouraged U.S. workers from applying because of the name. Further, the CO found that the Employer did not make sufficient attempts to contact U.S. workers, Ms. Jenkins, Ms. Soto and Mr. Balthazar, whom the CO found to be qualified

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

candidates. The Employer was required to document that it made good faith efforts at recruiting the U.S. workers. (AF 18-21).

The Employer's Rebuttal was submitted on January 10, 2004. (AF 8-17). In its Rebuttal, the Employer asserted that it employs 78 individuals. The Employer supplied its business license and a W-2 for the applicant. The Employer argued that the U.S. post office made two or three attempts at delivering the mail to the U.S. workers, so it was not at fault for the untimely delivery of the mail. Additionally, according to the Employer, the Employer's telephone number was listed in the cover letter, so the applicants could have easily called the Employer and requested another interview time. In regards to Ms. Jenkins, the Employer acknowledged that she received the letter after the interview day. However, the Employer added that Ms. Jenkins could have called for another interview. Neither Mr. Balthazar nor Ms. Soto showed up for their respective interviews, which, according to the Employer, was an indication that they were not interested in the job.

The Employer also indicated that the applicants would never see the Employer's agent's name on the return receipt, as the agent's name would be facing the envelope. According to the Employer, the only side the applicants would see was the portion where they signed their name. The reason the agent was receiving the return receipts, according to the Employer, was because the Employer was too busy and the agent was keeping track of the certification process.

On February 27, 2004, the CO issued his Final Determination denying the Employer's application. (AF 6-7). The CO was unconvinced by the Employer's Rebuttal that it had engaged in good faith recruitment efforts. The CO was not satisfied with the Employer's assurance that the U.S. Workers would not see the return address in the return receipt card because it was facing the envelope as it was being signed. The CO indicated that even if he set that concern aside, the Employer's submission of appointment letters to the U.S. workers that reached the U.S. workers after the scheduled interview could not be overcome by the Employer's assertion that the U.S. worker could have called and rescheduled the interview time.

The CO also found that the Employer did not make sufficient attempts to reach the U.S. workers. Because the Employer could not document that it made good faith efforts in recruitment and did not document that the qualified U.S. workers were unavailable, the CO denied the application.

On March 10, 2004, the Employer submitted its Request for Review. The Employer asserted that the CO's concern of the applicants reading the return address of the Employer's agent, "Estamos Unidos Immigration Service," was a non-issue as the applicants would never get to see the front part of the card. The Employer also indicated that the fact that the certified letters did not get to the applicants on time was not the responsibility of the Employer, as it was the applicants' fault for not picking up the letters as soon as possible. Additionally, the Employer argued that the letters included the Employer's telephone number, providing U.S. workers every opportunity to call and ask for another interview. (AF 1-3). The parties did not submit briefs in support of their respective positions. The Board docketed the case on June 25, 2004.

DISCUSSION

The Employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Since the Employer is seeking the benefit of a special provision of the Immigration and Nationality Act under which an alien is to be certified to fill a job for which U.S. workers also qualify, it is the Employer's responsibility to recruit in good faith and to document its efforts. A good faith recruitment effort is implicit in the regulations. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988).

The CO focused on three U.S. workers who, based on their experience, he considered qualified for the position: Ms. Soto, Ms. Jenkins and Mr. Balthazar. The applicants' resumes included the applicants' addresses and telephone numbers. The Employer asserts that it recruited in good faith because it mailed a single letter to all applicants scheduling them for an interview. We note that the letters were mailed five days before the interview date, giving the U.S. workers

one or two days to arrange their schedule to meet the interview time.[2] The regulations do not include this type of passive recruitment as an example of good faith recruitment. On the contrary, the regulations, as interpreted by the case law, indicate that the Employer must actively pursue all the U.S. workers who could qualify for the job opportunity. The Employer's failure to establish that it made a diligent effort to contact applicants is a material defect in the recruitment effort. *Gorchev & Gorchev Graphic Design,* 1989 INA 118 (Nov. 29, 1990) (*en banc*). Employers are under an affirmative duty to commence recruitment and make all reasonable attempts to contact applicants as soon as possible. *Yaron Development Co., Inc.* 1989-INA-178 (Apr. 19, 1991) (*en banc).*

Additionally, we have held that reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. *Dianna Mock*, 1988-INA-255 (Apr. 9, 1990). An employer has an obligation to try an alternative means of contact should the initial attempt fail. *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact the applicants. *American Gas & Service Center,* 1998-INA-79 (Jan. 12, 1999). It has also been held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan 16, 1992). Follow-up attempts to contact applicants are an essential element of the "good faith" recruitment process, and labor certification is properly denied where alternative methods of contact are not utilized and documented. *Divinia M. Encina*, 1993-INA-220 (Jun. 15, 1994); *Damas Atlantic, Ltd.*, 1993-INA-158 (May 4, 1994).

[2] The CO noted that in one case, an applicant received the letter after the interview day.

The Employer in this case wrongly assumed that it satisfied its duty to recruit in good faith through a single attempt to contact the applicants. This meager step shows a minimal effort—if any—that, by itself, does not equate to a good faith recruitment effort. The Employer's effort must show that it seriously considered the U. S. applicant for the job, not that it merely went through the motions of a recruiting effort without serious intent. *See Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*); *Suniland Music Shoppes*, 1988-INA-93 (March 20, 1989) (*en banc*).

The Employer's rejection of the U. S. applicants after an inadequate recruiting effort does not support the finding that its reasons for rejecting them were lawful and job-related within the meaning of the regulations. *John & Winnie Ng,* 1990 INA 134 (Apr. 30, 1991). Accordingly, we find that the Employer has failed to satisfy the requisite burden of proof, and that the CO, therefore, properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.